JUL 27 1945
CHARLES ELMORE CROPLEY

In the
Supreme Court of the United States
October Term, 1945

No. 269

MILTON ROE SABIN and BERTHA FLORENCE SABIN,
Petitioners,

VERSUS

HOME OWNERS' LOAN CORPORATION, a Corporation, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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July, 1945.

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In the
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October Term, 1945

No.

MILTON ROE SABIN and BERTHA FLORENCE SABIN,

Petitioners,

VERSUS

HOME OWNERS' LOAN CORPORATION, a Corporation; O. K. WETZEL; P. L. MURPHY; A. GARLAND MARRS, Sheriff of Tulsa County, Oklahoma; W. S. DUGGINS, NATE MARTIN, JOHN BURNETT and TOM KITHCART, Deputy Sheriffs of Tulsa County, Oklahoma; CAL CRUM, Clerk of the District Court of Tulsa County, Oklahoma; and JOE HODGES, doing business under the name and style of JOE HODGES TRANSFER AND STORAGE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

The petition of Milton Roe Sabin and Bertha Florence Sabin, petitioners, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved

January 10, 1938, judgment was entered in the District Court of Tulsa County, State of Oklahoma, in favor of the Home Owners' Loan Corporation and against petitioners, foreclosing a mortgage on petitioners' home (R. 130, 331).

Appeal from that judgment was perfected to the Supreme Court of the State of Oklahoma on August 8, 1938 [*Sabin* v. *Home Owners' Loan Corporation*, 187 Okla. 504, 105 Pac. (2d) 245].

Meantime, the judgment of foreclosure not having been superseded, and being unpaid, an order of sale was issued on July 18, 1938 (R. 132, 341).

Sale of petitioners' property having been had under that order of sale, and the Home Owners' Loan Corporation being the purchaser, the sale was confirmed by the District Court of Tulsa County, Oklahoma, on September 9, 1938 (R. 132, 349; Appendix I-III). This order of confirmation directed the Sheriff of Tulsa County, Oklahoma, to make and execute a deed to the purchaser, and that the clerk of said court issue a writ of assistance to the sheriff of said county directing him to put the purchaser in possession. These petitioners having given notice of appeal from said order of confirmation, the court extended the time for

making and serving case-made, and, in accordance with the provisions of the statute (Section 546, Okla. Stat. 1931, Appendix V), allowed these petitioners twenty days within which to file a supersedeas bond in the sum of $6,500.00.

On the same day, September 9, 1938, the sheriff executed and delivered to the Home Owners' Loan Corporation a deed to said property (R. 132, 351).

A new appeal was immediately perfected by petitioners to the Supreme Court of Oklahoma from the order of confirmation (*Sabin* v. *H. O. L. C., supra;* see also, R. 97, 158, 309); and, petitioners believing the amount of supersedeas bond fixed by the lower court in its order of confirmation to be excessive, asked the appellate court to fix the amount of such bond, and that Court, on September 26, 1938, entered an order staying execution in the lower court until further order of the appellate court (R. 136, 375).

Notwithstanding, the H. O. L. C. had a writ of assistance issued by the lower court on December 3, 1938, which was recalled on December 15, 1938, by order of its attorney (R. 176, 378).

After some controversy in the appellate court as to the amount of supersedeas bond, it was finally fixed at $2,000.00, and a bond was filed in that Court and approved, on February 27, 1939 (R. 132, 344).

An opinion was rendered by the Supreme Court of the State of Oklahoma on May 28, 1940 (*Sabin* v. *H. O. L. C., supra.*), and on June 13, 1941, a purported mandate from the Supreme Court of the State of Oklahoma (R. 132, 354),

undated and claimed to be otherwise defective, was filed in the District Court of Tulsa County, Oklahoma.

On July 21, 1941, the Home Owners' Loan Corporation filed in the District Court of Tulsa County, Oklahoma, an application for an alias writ of assistance (R. 239, 384), and thereupon a purported alias writ of assistance was issued by the clerk of said court (R. 157, 376).

On July 24, 1941, petitioners filed in the Supreme Court of the State of Oklahoma, with leave of that Court granted at a time when the Home Owners' Loan Corporation was represented by counsel there present (R. 147, 179, 180), a petition to recall mandate and grant a rehearing (R. 134, 356); notice of which was given to the sheriff of Tulsa County, Oklahoma, on July 25, 1941 (R. 149, 236, 379).

On July 26, 1941, the sheriff executed the writ of assistance (R. 157, 376) by removing all of petitioners' household furniture, personal effects, automobiles and other property, and placing the Home Owners' Loan Corporation in possession.

Petitioners' petition to recall mandate and grant a rehearing was not finally denied by the Supreme Court of the State of Oklahoma until September 5, 1941 (R. 288, 385), and a writ of *certiorari* was denied by this Court on February 5, 1942 (*Sabin* v. *H. O. L. C.*, Mem. 315 U. S. 800, 62 Sup. Ct. 625, 86 L. ed. 1201). No further proceedings have been had in the Supreme Court of the State of Oklahoma since that time, and no further mandate has issued from that

Court to the District Court of Tulsa County, Oklahoma (R. 135, 373).

This action was filed by petitioners on July 24, 1943, in the District Court of Tulsa County, Oklahoma, against all persons concerned in the execution of the alias writ of assistance and the eviction of petitioners from their home, to recover damages in excess of $400,000.00 for the alleged wrongful eviction of petitioners (R. 2-25).

The action was removed to the District Court of the United States for the Northern District of Oklahoma (R. 33), where it was tried on February 22, 1944 (R. 92), and at the close of the evidence of petitioners the case was dismissed by the Court as to the defendants Wetzel, Murphy and Crum (R. 253), and at the conclusion of all the evidence the court instructed the jury to return a verdict in favor of the Home Owners' Loan Corporation (R. 314), and submitted the case to the jury as to the other defendants only upon their acts in connection with an adjoining lot not here now involved.

B.

Basis of Jurisdiction of This Court

Petitioners appealed from the judgment of the District Court of the United States for the Northern District of Oklahoma to the Circuit Court of Appeals for the Tenth Circuit, and that Court rendered judgment affirming the District Court on February 21, 1945 (R. 407). The opinion of the Circuit Court of Appeals (R. 399) is reported in 147 Fed. (2d) 653.

Petition for rehearing was filed by petitioners (R. 408), and was denied by the Circuit Court on March 19, 1945 (R. 435).

On June 14, 1945, within the three months allowed by statute (Title 28, Section 350, U. S. C. A.) for filing petition of *certiorari* in this Court, Justice Rutledge of this Court extended the time for filing such petition until July 19, 1945, and before the expiration of that time and on July 13, 1945, Justice Black further extended the time therefor until July 28, 1945, and this petition is presented and filed within such extended time.

Jurisdiction is conferred upon this Court by Title 28, Section 347(a), U. S. C. A. (Jud. Code #240, as amended) to require by *certiorari* that said cause be certified to this Court by the Circuit Court of Appeals for the Tenth Circuit for determination by this Court.

C.

Questions Presented

1. Whether petitioners were denied due process of law by being evicted from their home under a writ of assistance issued to place in possession one claiming title under a sheriff's deed made and executed at a time when execution was stayed.

2. Whether petitioners were denied due process of law by being evicted from their home under a writ of assistance issued out of the District Court of Tulsa County, Oklahoma, at a time when the Supreme Court of the State of Oklahoma

had re-assumed and had sole jurisdiction of the case in which such writ of assistance was issued.

D.

Reasons Relied On for the Allowance of the Writ

The Circuit Court of Appeals held (R. 404) that further execution under the order confirming sale was stayed for a period of at least twenty days, as provided by the order (Appendix I-III), under the provisions of Title 12, Sec. 971, Okla. Stat. 1941 (Section 546, Okla. Stat. 1931, Appendix V); but at the same time held that the sheriff's deed executed and delivered during that twenty-day stay period was not thereby rendered void. This decision decides an important question of local law in a way probably in conflict with applicable local decisions, particularly the decision in *Goldstern* v. *Gavin*, 187 Okla. 338, 102 Pac. (2d) 582, in which case the principle was laid down that title to property remained in the defendant until confirmation of sale; also the decision in *Fariss* v. *Deming Investment Co.*, 5 Okla. 496, 50 Pac. 130, in which it was held that supersedeas cannot be ignored or an execution issued as long as it remains on record until its effect has been tested by direct attack; also the decision in *Brauns* v. *Donahoe*, 127 Okla. 33, 259 Pac. 541, which case holds that a supersedeas bond given to stay execution on an order confirming sale is for the purpose of covering damages, among other damages, caused by reason of delay in obtaining sheriff's deed. It likewise conflicts with the great weight of authority in a question of general law, particularly the decision in *Board of Regents* v. *Linscott*,

30 Kan. 241, 1 Pac. 81, 91, holding that a sheriff's deed is required to vest title, and *Anthony* v. *Janssen*, 183 Cal. 329, 191 Pac. 538, and *In re Worley*, 50 Fed. Supp. 611, which cases hold that a sheriff is without lawful power or authority to execute a deed at a time when an order of confirmation has been stayed. The decision therefore operates to sanction the deprivation of petitioners' property without due process of law.

The Circuit Court of Appeals held that by the Supreme Court of the State of Oklahoma granting leave to petitioners to file in that Court a petition to recall mandate and grant a rehearing, and considering such petition, jurisdiction of the case was not re-assumed by that Court so as to deprive the District Court of Tulsa County, Oklahoma, of jurisdiction to proceed with an execution in the case at the same time such petition was being considered in the appellate court (R. 405). This decision of the Circuit Court of Appeals is contrary to the decision of this Court in *Chicago G. W. R. Co.* v. *Basham*, 249 U. S. 164, 63 L. ed. 534, 39 Sup. Ct. Rep. 213, in which case this Court laid down the principle that while a judgment was being considered by a state court of last resort upon a petition for rehearing the litigation is not brought to a conclusion in that Court until such petition is disposed of by it. The decision is likewise in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Warren* v. *Terr. of Hawaii*, 119 Fed. (2d) 936, holding that the entertainment by a court of appeals having power to recall a mandate but not having recalled it, of

a petition for rehearing, amounts to a re-assumption of jurisdiction of the case by the appellate court. The decision likewise probably conflicts with the decision of the local court in *Ehrig* v. *Adams,* 67 Okla. 157, 169 Pac. 645, in which case the Supreme Court of Oklahoma recalled a mandate, granted a rehearing, and rendered an opinion directly contrary to its original opinion; and with the decision in *Egbert* v. *St. Louis & S. F. R. Co.,* 50 Okla. 623, 151 Pac. 228, holding that no two courts can have jurisdiction of the same cause of action at the same time. It likewise conflicts with the great weight of authority in a question of general law, particularly the cases cited in the *Egbert case, supra,* to the same effect as held in that case. The decision therefore operates to sanction the deprivation of petitioners' property without due process of law.

Prayer for Writ

Wherefore, your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 3063, Milton Roe Sabin and Bertha Florence Sabin, Appellants, v. Home Owners' Loan Corporation, a corporation, O. K. Wetzel, P. L. Murphy, A. Garland Marrs, Sheriff of Tulsa County, Oklahoma, W. S. Duggins, Nate Martin, John Burnett and

Tom Kithcart, Deputy Sheriffs of Tulsa County, Oklahoma, Cal Crum, Clerk of the District Court of Tulsa County, Oklahoma, and Joe Hodges, doing business under the name and style of Joe Hodges Transfer and Storage, Appellees;" and that said judgment of the United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MILTON ROE SABIN and
BERTHA FLORENCE SABIN,
Petitioners.

HERBERT K. HYDE,
Attorney for Petitioners.